In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 278

J. GORDON TURNBULL, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether petitioner, during its 1952, 1953, and 1954 tax years, was subject to the additional tax which Section 102 of the Internal Revenue Code of 1939 imposed on excess accumulations of corporate earnings, or whether it was immune from liability either as a matter of law because it was contemplating liquidation in 1953, or as a matter of fact because the evidence demonstrated a reasonable business need for the accumulation.

Until his death on April 1, 1953, J. Gordon Turnbull and his wife owned all of petitioner's stock. Thereafter, Mr. Turnbull's attorney and his widow, pursuant to an earlier understanding with him, took

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numerous ratio tests normally applied in cases of this type, the borrowing practices of the petitioner, the availability of sufficient accumulated earnings to finance the purchase of a substantial portion of its stock by another corporation and the economic benefits flowing to its stockholders as a result of its accumulation practices. (Pet. App. B–38–41, 46–47.)

The petitioner also claims (Pet. 9) that there could be no purpose to avoid surtax where the corporation is in the process of liquidating since any distribution during such a period "should be deemed" a liquidating distribution taxable at capital gain rates only. But, *Hellmich* v. *Hellman,* 276 U.S. 233 (the only authority cited in support) deals only with true liquidating distributions which are there defined as "a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation." *Id.* at 235. The capital treatment accorded such distributions necessarily assumes that earnings not needed in the business have, before liquidation, been distributed as dividends. Otherwise the purpose of Section 102 could readily be subverted by an accumulation followed by a "liquidation." Only the failure to make an ordinary dividend distribution of the excessive accumulation of earnings brought Section 102(a) into play here.

There was in fact no liquidation in this case. Petitioner does not explain what degree of subjective intent to liquidate at some undetermined date in the future should, under its theory, make available to a corporation the right freely to accumulate and then in liquidation distribute its earnings at capital gain rates. Here, the Tax Court found (Pet. App. B–41) that

no formal plan of liquidation had been adopted, but that petitioner was in the process of "winding up its affairs." The latter state is not taken account of in the Code and could conceivably obtain for a period of many years during which business earnings are received and duly distributed as dividends to stockholders.

Moreover, the alleged intent to liquidate was formed on or after the death of Mr. Turnbull on April 1, 1953 (Pet. App. B–20, 21) and thus could have had no bearing upon the accumulations prior thereto which included most of the period here in issue.

Nor does the contention raise an important question of law, for the reported cases reflect only a few instances where a taxpayer has advanced it; it has not, to our knowledge, been considered by the courts of appeals other than in the instant case and the trial courts, in each instance where it has been urged, has rejected it.[3]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] See *Hedberg-Freidheim Cont. Co.* v. *Commissioner*, decided December 13, 1956 (P–H Memo T.C., par. 56,275), affirmed without discussion of the question here, 251 F. 2d 839 (C.A. 8); *Turner* v. *Commissioner*, decided April 15, 1965 (P–H Memo T.C., par. 65,101). And see O.D. 838 (4 Cum. Bull. 226 (1921)).

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